Little Rock Electrical Contractors, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 480, AFL–CIO. Case 26–CA–17230

March 22, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On August 29, 1997, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief to the General Counsel's and the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt his recommended Order as modified below.[3]

We agree with the judge that the Respondent did not violate the Act by not hiring Union Business Agents Wayne Alan Divine and Sammy Yelverton. We assume arguendo that the General Counsel established a prima facie case for an 8(a)(3) violation. However, the Respondent has shown that its nonhiring of these two applicants was for legitimate nondiscriminatory reasons.

At all relevant times, the Respondent operated under a written rule which prohibited employees at the project from working simultaneously for the Respondent and another employer. There is no allegation that the rule is unlawful. The record shows that Divine and Yelverton were full-time employees of the Union when they applied. The General Counsel does not contend that they intended to give up their union employment upon being hired by the Respondent.[4] Thus, the employment of these two applicants would have violated the Respondent's rule.

The judge found, as a fact, that the Respondent's policy was the reason for its nonhiring of Divine and Yelverton. In light of the parties' stipulation that the policy applied to the project for which the Respondent was hiring, the judge's fact finding is clearly reasonable. Accordingly, we would adopt it. The fact that the Respondent did not tell Divine and Yelverton of this reason for not hiring them does not mean that it was not the reason. There is no obligation in the law to tell applicants of the reason for rejecting them.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Little Rock Electrical Contractors, Inc., Little Rock, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Little Rock, Arkansas, facility copies of the attached noticed marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 27, 1995."

MEMBER LIEBMAN, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated the Act as the judge found.[1]

Contrary to my colleagues, I would grant the General Counsel's exception to the judge's conclusion that the Respondent did not unlawfully refuse to hire Union Business Agents Wayne Alan Divine and Sammy Yelverton. In agreement with the General Counsel, I would

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1051). We have carefully examined the record and find no basis for reversing the findings.

[2] It is unnecessary to find that the Respondent, through Elton Smith, violated the Act by insisting that Stephen Hilton remove his union button because such a finding would be cumulative and would not affect the remedy. We therefore do not pass on the judge's finding that Elton Smith is the Respondent's agent.

In finding that the Respondent violated the Act, the judge relied on two incidents in which Smith assaulted employees and on Foreman George Parlet's "acquiescence" in and "adoption" of the assaults as evidence of union animus. We do not rely on the judge's discussion. The record contains ample other evidence of what the judge correctly termed the Respondent's antiunion animus.

Member Hurtgen does not rely on the judge's statement that an inquiry into a job applicant's union membership, made in the context of a job interview, is inherently coercive. Further, he rejects the Charging Party's attempt, through its exceptions, to broaden the scope of the complaint to include allegations the General Counsel did not allege.

[3] We shall modify the judge's recommended Order in accordance with our decisions *in Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997).

[4] Yelverton testified that he intended to continue to work for and be paid by, the Union. There is no suggestion that Divine was different in this respect.

[1] The General Counsel has also excepted to the judge's failure to find that Superintendent Art Parlet unlawfully interrogated employee David Gibson. I would find it unnecessary to pass on this issue, because the finding of such an additional interrogation would be cumulative and would not affect the remedy.

would find that the Respondent did not in fact invoke its rule which prohibits simultaneous employment as a reason for failing to hire Divine and Yelverton.[2] The Respondent's rule states that full-time employees of the Respondent "must state that they will not be employed by any other employer while they work for Little Rock Electrical Contractors, Inc." The Respondent does not contend, and there is no record evidence, that the Respondent ever asked Divine or Yelverton whether they intended to work for another employer if they were hired by the Respondent, and there is no evidence that either one of them informed the Respondent that they so intended. Thus, there is no evidence that the Respondent, in refusing to hire them, had any basis for believing that either one would not comply with its rule. Accordingly, there is no basis for the judge's conclusion that the Respondent relied on the rule as a basis for refusing to hire them.[3] I therefore conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Divine and Yelverton.

Michael W. Jeannette, Esq., for the General Counsel.
George E. Smith, Pres., and (brief only) *Charles F. Mills, Esq.,* of (Little Rock, Arkansas*),* for Respondent, LRE.
Wayne A. Divine, Asst. Bus. Mgr., of Jackson, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a "salting" case in which, the Government alleges, Little Rock Electrical Contractors (LRE), among related allegations, refused to hire eight job applicants on November 27, 1995, and one applicant on January 16, 1996, because of their support of the Union.[1] Denying the allegation, LRE defends on several grounds, including the contention that the applicants were not good-faith applicants and therefore not statutory employees. Rejecting LRE's defenses and finding in favor of the Government (except as to three of the nine), I order LRE to offer six of the nine reinstatement and to make them whole, with interest.

I presided at this 3-day trial, January 21 through 23, 1997, in Jackson, Mississippi. Trial was pursuant to the July 18, 1996, complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board (the Board) through the Acting Regional Director for Region 26 of the Board.

The complaint is based on a charge filed March 3, 1995, by International Brotherhood of Electrical Workers, Local Union No. 480, AFL–CIO (the Union, Local 480, or the Charging Party) against Little Rock Electrical Contractors, Inc. (LRE or Respondent).

In the Government's complaint, the General Counsel alleges that LRE violated Section 8(a)(1) of the Act when, among other conduct from about December 4, 1995, to about January 16, 1996, Superintendent Art Parlet interrogated employees. Alleged Supervisor Elton Smith allegedly insisted that an employee remove his union button about December 8. The complaint also alleges that LRE's refusal to hire the nine job applicants violated 29 USC § 158(a)(3). LRE denies violating the Act.

The pleadings and stipulation (Tr. 1:7–8)[2] establish that the Board has both statutory and discretionary jurisdiction over LRE, that LRE is a statutory employer, and that IBEW Local 480 is a statutory labor organization.

For witnesses the General Counsel called assistant business manager and organizer, Wayne Alan Divine (who, before leaving the stand, was called, out of order, as LRE's first witness), union members/electricians Ralph Brown, Marby R. Penton Jr., Thomas G. McCallum, Michael V. Pickett, James T. Horn, Hewitt P. Barton Sr., Hewitt P. Barton II, William P. Barton, Superintendent George Arthur Parlet II, other members/electricians David Gibson, Johnnie H. Smith Jr., Stephen C. Hilton, and assistant business managers, and organizers, Sammy Yelverton and, again, Wayne A. Divine. The General Counsel then rested, as did the Charging Party. (Tr. 3:445.) Other than calling Divine out of order for a few questions early in the trial, LRE called no additional witnesses and rested immediately after the General Counsel and the Union did. (Tr. 3:446.) The General Counsel had a brief rebuttal stage while Divine, as the last witness, was on the stand. (Tr. 3:439, 442.)

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel (who attached a proposed order and notice) and LRE, I make these

FINDINGS OF FACT

A. Procedural Matters

When LRE rested, the General Counsel moved to conform the pleadings to match the evidence respecting any variation in dates, or a "last name unknown." The motion was only to clarify existing allegations, and not to add any new allegations or to obtain unfair labor practice findings for anything not alleged. I granted the motion merely to correct variations in names, dates, and place—but "not granted to any substantive correction or modification or addition to the complaint, only for variations on dates and names, places." (Tr. 3:446–447.) The nature of the Government's motion—the basis for my granting that motion—has become an issue.

On brief, the Government (Br. at 4 fn. 9) moves to withdraw the first part of complaint paragraph 7(e). Paragraph 7(e) alleges that, about January 16, 1996, Superintendent Art Parlet "solicited an employee to act as an agent of Respondent and interrogate an applicant concerning his union membership and activities." The General Counsel's motion reads (fn. 9):

> Counsel for the General Counsel maintains that Complaint Paragraph 7(e) constitutes two allegations in that soliciting an employee to be an agent is one allegation and interrogation is the other. The basis for this contention is that the allegation is separated by a coordinating conjunction—and. The word

[2] See *Willmar Electric Service,* 303 NLRB 246 fn. 2 (1991). In so finding, I do not pass on the validity of such a rule as expressed in *Willmar*.

[3] Contrary to the implication of my colleagues in the majority, I am not relying on the fact that the Respondent did not inform Divine and Yelverton that they were not being hired because of its rule. Rather, there is simply no basis for a finding that the Respondent relied on the rule at all.

[1] All dates are for 1995 unless otherwise indicated.

[2] References to the three-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's and R. Exh. for Respondent LRE's.

> "and" is defined as meaning "also" or "plus" and thus two separate acts. While the record is void of evidence that Parlet solicited an employee to act as an agent, it is undisputed that in January Parlet interrogated [David] Gibson regarding his Union membership. [Cites omitted.] Thus, the first part of the allegation is withdrawn.

Although the General Counsel states that the solicitation allegation "is withdrawn," such action is not procedurally possible. Once evidence has begun to be adduced at an unfair labor practice trial, as here, the stage of the proceeding passes from the Government's absolute prosecutorial control to the adjudicatory stage, and the prosecutor (the General Counsel[3]) must address the subject of amending the complaint by motion. *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises),* 314 NLRB 923, 923 fn. 2 (1994). Construing the General Counsel's expression as a motion to withdraw the solicitation allegation, I grant the motion.

Turning now to the second portion, the interrogation allegation, I find no merit to the General Counsel's contention that it is an independent allegation—an allegation that Parlet interrogated [and the past tense would have been appropriate had it been an independent allegation] an applicant about January 16, 1996. It is clear that paragraph 7(e) is a single allegation—that Parlet, about January 16, 1996, solicited an employee to go and interrogate an applicant. At trial that is the way the General Counsel read the allegation (Tr. 2:365), and also the way Respondent read it when LRE objected (Tr. 2:366). While LRE's objection may not be precise, it must be remembered that, at trial, LRE, represented by its president, was functioning as a pro se. Consequently, some leeway must be granted, and I therefore find that LRE did not waive its objection. Thus, the Government is restricted to the question of whether it adduced evidence in support of the allegation as set forth in paragraph 7(e). Finding that it did not do so, and as the General Counsel's motion is only partial, I shall dismiss complaint paragraph 7(e) in its entirety.

B. Overview

LRE is an electrical contractor in the building and construction industry. Headquartered in Little Rock, Arkansas, LRE was engaged in this case as the electrical subcontractor at a jobsite in Jackson, Mississippi. The Jackson jobsite is a 16-store shopping center complex known as "The Junction" on the north side of Jackson. (Tr. 2:208–209, 303–304.) The general contractor was CDI Contractors. (Tr. 2:314.)

Art [the name he uses, Tr. 2:303] Parlet, currently employed (Tr. 2:303) by Lynn Rogers Construction [the name is not clear in the record], testified (Tr. 2:311) that he was LRE's foreman on The Junction project, and he reported to LRE's project manager, Willie Godwin. (Tr. 2:313.) Godwin is one of LRE's partners. (Tr. 2:307.)

Parlet apparently arrived at the jobsite from Arkansas about early October 1995. (Tr. 2:304.) Although Parlet has no license from the city of Jackson (Tr. 2:304), Elton Smith [whose supervisory status is in issue] has a master's license from the city and the city permit was issued under Smith's license. (Tr. 2:305–306.) Parlet testified that Smith (who did not testify) began working at the jobsite about October 9. (Tr. 2:305.) Smith, Parlet testified, is "elderly" ("almost 70," Tr. 2:331) and, in the beginning, helped out but did not do the "heavy" work. (Tr. 2:305.) The timecards in evidence show that even in December 1995 Smith generally worked only 20 hours a week. In January 1996, Smith began working, usually, 40 hours a week. (R. Exh. 4.) I discuss Smith's status in more detail later.

Union Representatives Divine (Tr. 1:27–28) and Yelverton (Tr. 3:412) testified that, in early November 1995, they saw an advertisement by Labor Finders (a temporary employment agency) for electricians in the local newspaper, the Jackson Clarion-Ledger. Although they left applications with Labor Finders, they never received any response. They did learn from Labor Finders, however, that LRE was one of the contractors seeking electricians.

Parlet testified that he was responsible for receiving all job applications for The Junction project (Tr. 2:309), and that he did the hiring for the project. (Tr. 2:310, 313.) Consistent with the parties' stipulation that LRE is a nonunion contractor (Tr. 1:72), Parlet testified that, although LRE's policy is to be nonunion, or open shop (Tr. 2:313, 319–320), LRE does not discriminate (Tr. 2:320) but hires on merit (Tr. 2:314).

Project Manager Godwin's instructions to him respecting hiring, Parlet testified (Tr. 2:338–339), were to treat everyone (that is, union and nonunion) equally. Parlet's hiring process consisted of reviewing the applications,[4] the notes he made during the interview process, reference checks, and an evaluation of merit. (Tr. 2:309–311, 314–315, 322, 332, 341.) Union Representative Divine (Tr. 1:38) and Foreman Parlet (Tr. 2:304–305, 331) agree that, under city regulations, the jobsite had to have working at least one journeyman licensed by the city of Jackson.

As the parties stipulated (Tr. 1:12–13), at all relevant times, LRE operated under a written hiring policy, and this policy applied to The Junction project. The written policy (attached to many of the applications in evidence) consists of two pages. (R. Exh. 6.) One page appears on a sheet bearing LRE's letterhead and is titled as LRE's "Hiring Policies." The second page appears to be an independent, generic form, with lines for the applicant's signature and date. I use "first" and "second" page only because the exhibit (R. Exh. 6) has them in that sequence. As part of the application exhibits, they frequently are in the reverse order. Clearly, the first, or letterhead, page (which has no lines for signature or date) is expressly that of LRE. These "Hiring Policies" read (R. Exh. 6 at 1):

> HIRING POLICIES
>
> We hire applicants solely based upon merit. We do not discriminate on the basis of union affiliation, race, sex, color, age, national origin, disability or any other protected status.
>
> No employee is required to pay dues to any labor organization to join Little Rock Electrical Contractors, Inc.
>
> We accept job applications only when we know there are jobs available and when we intend to fill the position(s) from persons not currently employed by Little Rock Electrical Contractors, Inc. When openings become available, we reserve the right to review active applications on file, prior to hiring. Applications remain active

[3] *Teamsters Local 722 (Kaspar Trucking),* 314 NLRB 1016, 1017 and fn. 9 (1994).

[4] Earlier I had received the parties' stipulation that LRE relied, in part, on the applications in making its hiring decisions. (Tr. 2:146–147.)

for fifteen (15) days. It is the applicant's responsibility to keep our hiring personnel informed on his/her availability.

We do not accept group applications or photocopied forms. We hire based on personal contact with individuals so that we can make sound business judgments as to the most qualified applicants.

Any applicant who falsifies or omits information on the application is disqualified from being hired. If the applicant has been hired before the falsification or omission is discovered, he or she is subject to termination.

We base our hiring decisions in [on] a variety of factors, including skills and ability to perform the job, prior employment with Little Rock Electrical Contractors, Inc., employment references as to character and willingness to work, willingness to accept the offered salary, and personal interviews.

Full-time employees are expected to work only for Little Rock Electrical Contractors, Inc. and must state that they will not be employed by any other employer while they work for Little Rock Electrical Contractors, Inc.

The last paragraph just quoted is generally duplicated in the penultimate paragraph of the generic page, with the ultimate paragraph there being a certification that all statements are correct "to the best of my knowledge and any misrepresentation or omission on my part is cause for rejection or termination."

After receiving no word from the Labor Finders employment agency, Divine launched a campaign to organize LRE at The Junction jobsite. (Tr. 1:54.) The campaign included sending out-of-work members, or members on strike elsewhere, to apply for work with LRE at The Junction. Some members were sent as covert "salts," while others—including both Divine and Yelverton—went with union insignia openly displayed in everything but neon. As described by Divine at trial, his goal was, in effect, to "organize the unorganized."[5]

At trial, Divine was asked whether he wanted to apply for work and organize in "good-faith [a protected purpose]," or for the bad-faith purpose of gaining control of a substantial number of LRE's employees, calling a strike at a critical time, plus using other tactics, such as advising LRE's customers that business with LRE would guarantee labor problems, all for the [unprotected] goal of destroying LRE's business endeavors in Jackson and running it out of town. Divine's answer to all such questions was that his purpose was the former. If hired, he and the others would do good electrical work and also organize by seeking to educate nonmembers on the benefits of joining the Union. Divine testified that he did not want to destroy LRE, or to sabotage it, but instead wanted to organize the employees and, in effect, reach a collective-bargaining agreement with LRE. (Tr. 1:63–64, 78–79, 81, 85, 93–95, 97, 100–102, 104; 2:130–132.)

At trial (Tr. 1:23–24, 71, 76, 83–84, 96, 99), and fleetingly on brief (Br. at 21), LRE argues that a May 1994 IBEW manual of 65 pages, plus attachments, shows a "conspiracy" (Tr. 1:23) between the International and its Locals, and their organizers, to disrupt the job and to drive nonunion firms such as LRE out of business, and that the "salts" were not, therefore, good-faith job applicants. Although Divine acknowledges that he has attended union seminars in which the 65-page document (R. Exh. 1)[6] was used for the purpose of training organizers, he asserts that he actually has never read the document. (Tr. 1:70–71, 81–82.) Divine testified that organizing by Local 480 is controlled locally—by the Union's business manager, the organizers, and by what methods fit the local situation. (Tr. 1:85.) The International's 65-page manual is not a bible or blueprint to be followed in detail, but "just basic guidelines" to be interpreted and applied as local conditions dictate. Local 480's methods may, or may not, match the IBEW's suggested methods. (Tr. 1:85–86, 88.) Divine does not use the document on a "daily basis." (Tr. 1:100.) Divine denies that he acted on instructions from the IBEW, and asserts that he did his own organizing. (Tr. 1:89.)

The facts in this case fall short of demonstrating that the organizing campaign of Local 480 and Union Representative Divine was nothing but a bad-faith effort to put LRE out of business—conduct unprotected by the Act. The methods described in the IBEW's 65-page manual (R. Exh. 1) no doubt could be used in support of an unlawful objective, or in association with unlawful means. But they also can be used (and generally read as if they are designed to be so used) with a lawful objective. That lawful objective would involve using all lawful means in applying all lawful economic pressures, including covert and open "salts," strikes when unfair labor practices have been committed, and filing of NLRB charges, to fulfill the "first obligation" of the members of the local union, as described in the suggested Salting Resolution attached to the IBEW's 65-page manual (R. Exh. 1 at 9; Exh. A), to "organize the unorganized."

There is some language in the manual which appears to focus on a targeted employer's customers in a dubious way. For example, suggesting that some tactics may be effective in causing customers to switch to "signatory employers, or at least, cause them to stop using XYZ." (R. Exh. 1 at 15.) And, to determine which tactics would "discourage future customers." Id. Also, "every customer or job switched to a signatory employer enhances the work opportunities and job security of union craftsmen." Id at 18. Thus, "Deny the contractor his customers and/or his qualified manpower, and he immediately ceases to be a factor in the industry." Id. at 3, 23. In any event, Divine credibly testified that he has never gone to an employer's customers. (Tr. 1:99–100.)

While I credit Divine that he was not acting on any instructions or directives from the IBEW, and that he never actually "sat down and read" (Tr. 1:81) the 65-page manual, such findings are largely irrelevant. The material point is that, as Divine acknowledges, he attended IBEW sponsored training classes at which lecturers distributed, and discussed, copies of the very manual in evidence (R. Exh. 1) here. The key question is what did Divine and the union salts do here. And that would be the question even if, contrary to Divine's testimony, he consciously followed the IBEW's manual as a blueprint for the organizing effort here. Although I credit Divine that he did not follow the manual as a bible or blueprint, it is clear, and I find, that the training classes in the organizing methods described in the manual had a strong impact on Divine. As Divine essentially concedes, he uses the manual's suggested methods as guidelines which he adapts, or not, to fit the local situation.

[5] "'Heed this cry that comes from the hearts of men. Organize the Unorganized.'—John L. Lewis, 1935." Pete Seeger and Bob Reiser, **CARRY IT ON! A History in Song and Picture of America's Working Men and Women** 143 (1985, Simon & Schuster).

[6] "Union Organization in the Construction Industry" (May 1994, IBEW special products department).

The question, then, is what was done here. Do the events here demonstrate that Divine and the others were not good-faith job applicants? Do events here show that the applicants were merely part of a scheme to shut down the job and run LRE out of town if it did not sign a contract? As indicated a moment ago, and later in this decision, in my view the evidence fails to establish bad faith on the part of Union Representative Wayne A. Divine or the salts he sent as job applicants. They wanted to organize, and to get a contract, but they also wanted to do good work. The evidence fails to show that the Union wanted to shut down the job or run LRE out of town (by unlawful means) if it did not sign a contract. That (the "running out of town") is to be distinguished from persistence, notwithstanding the employer's expressions of disinterest. (Tr. 2:251.) As Divine testified, the employees may be interested in joining the Union regardless of LRE's preference. (Tr. 1:95.) As already mentioned, the Union goes to the jobs "to spread the word about the IBEW, and inform electricians of our wages and benefits, and if they want to be a part of it, we welcome them in." (Tr. 1:79, 85, 94.)

According to Divine (Tr. 1:95), if the employees are not interested, the union leaves. Whether that is so was not litigated here. There is some evidence that employees, apparently not members of the Union, threw away authorization cards tendered them about December 7 in the trailer in the presence of Foreman Parlet. (Tr. 2:348–349; R. Exh. 7; 2:399.) Evidence was not offered whether any nonmembers signed union cards.

So far as the record shows, the Union began its organizing campaign by sending a covert salt, James T. Horn, to obtain a job at LRE's Jackson jobsite. (Tr. 1:29; 2:212–213; 3:413.) As a covert salt, Horn testified, he would apply as if he were not a union member and as if he had no union background or credentials. In fact, Horn has been a member of Local 480 for 10 years (Tr. 2:212), and has attended the IBEW's COMET classes for methods on union organizing campaigns. (Tr. 2:246–247, 254.) Horn applied on November 10. (Tr. 2:212; R. Exh. 3d3.) He wore no union insignia. The contractors he listed on his application are nonunion—and he has never worked for them. (Tr. 2:213.) Horn's function as a covert salt involved observing, and also trying to organize employees before and after work, at breaks, and at lunch. (Tr. 2:213, 242, 252.) During production time, Horn did his job as an electrician. (Tr. 2:253.)

Horn possesses a journeyman electrician's license (G.C. Exh. 2) from the city of Jackson. (Tr. 2:211, 243.) This fact prompted Parlet to proclaim that Horn was a "godsend" because the city inspector had shut him down on several occasions for not having a Jackson-certified journeyman electrician on the job. (Tr. 2:214.) Parlet's recollection, that the city inspector had only threatened to do so but never did (Tr. 2:331), does not conflict with Horn's credited version because, I find, Parlet merely exaggerated a bit in expressing his joy when hiring Horn.

Divine's next move (recall that he "orchestrated" the campaign, Tr. 1:54) was to send a group of eight open salts to the jobsite to be hired. The group of eight included the two staff organizers, Assistant Business Agents Divine and Yelverton. The eight members of the group are: Hewitt Barton Sr., Hewitt Barton II, William Payne Barton, Wayne Divine, Marby Robert Penton Jr., Michael Varner Pickett, Johnnie H. Smith Jr., and Sammy Yelverton. Openly wearing big union organizer buttons (G.C. Exh. 3), and other union insignia, the eight went in two cars to the jobsite where they completed and submitted employment applications which openly identified them as union members or union organizers. Only Pickett's application (R. Exh. 2g1, 4) showed that he possessed (Tr. 2:194) a journeyman's license from the city of Jackson. According to Parlet (Tr. 2:331, 346), the only electricians he was prepared to hire were those with Jackson city licenses. He so informed Divine as the two stood outside the jobsite trailer. (Tr. 2:317, 345.) None of the eight ever heard from LRE concerning their job applications. Parlet concedes that the only application he reviewed was Pickett's, but when he called Phillips Electric, one of the job references listed, he was told they would not give a favorable recommendation. Phillips, Parlet testified, declined to give any details other than to say that Pickett was not eligible for rehire. Based on that report, apparently, Parlet rejected Pickett. (Tr. 2:329–332.) [I overruled the General Counsel's hearsay objection to the report because it was offered, and received, for the limited purpose of showing the basis, of whatever source, for Parlet's decision to reject Pickett. That does not require me to credit Parlet, although, noting the absence of any rebuttal by Pickett, I do credit Parlet concerning the report.]

Divine and Yelverton next sent covert salts Ralph Brown (Tr. 1:36, 107, 118), Thomas G. "Sonny" McCallum (Tr. 1:36–37),[7] Larry Joe Alting (Tr. 1:37), Tommy Dearing (TR. 1:37), Orby C. "Sonny" Renfroe (Tr. 3:428), and David Gibson (Tr. 1:37; 2:352.) Yelverton, and possibly Divine, sent Stephen Clay Hilton. (Tr. 1:35–36; 2:391.) Divine and Yelverton told the covert salts to conceal the fact of their union membership. (Tr. 2:39–40.)

Brown applied on December 1 (Tr. 1:107, 113; R. Exh. 3a3), was hired on December 5, and began work on Wednesday, December 6. (Tr. 1:108; 2:316; R. Exh. 4a,b.) A Jackson licensee, Brown tendered his journeyman's license to Parlet who made a copy (R. Exh. 3a8) of it. (Tr. 1:108; 2:135, 333, 347.)

Hilton, a fourth-year apprentice, actually was dispatched by Yelverton as an open salt. (Tr. 2:391.) Hilton applied on Monday, December 4. (Tr. 2:391, 404; R. Exh. 3c3.) Parlet said that the Union could blackball Hilton for working nonunion and that Hilton should think about it overnight. Hilton returned the next day, December 5, said he was ready to work, and was put on the payroll. (Tr. 2:320, 343–345, 392–393, 404–405; R. Exh. 4-1; R. Exh. 7.)

McCallum applied on Friday, December 8, and began work on Monday, December 11. (Tr. 2:168, 171; R. Exh. 3e3; R. Exh. 4b.) As McCallum testified (Tr. 2:304), as his application reflects (R. Exh. 3d7), and as Parlet concedes (Tr. 2:317–318, 332), McCallum did not have a journeyman's license from the city of Jackson.

Alting applied on Tuesday, December 12 (R. Exh. 5a1), Parlet hired him (Tr. 2:315), and Alting started work the next day, December 13 (R. Exh. 4e).

Dearing, who possessed a journeyman's license from the city of Pearl, Mississippi, applied December 27. (R. Exh. 3b3,7–8.) His first day on the payroll was not until Wednesday, January 17, 1996. (R. Exh. 4-o.) No direct testimony shows when Dearing was hired. A handwritten note (apparently by Parlet, Tr. 2:311) at the top of Dearing's W-4 form (R. Exh. 3b10)

[7] McCallum asserts that he was told of the job only by James Horn. (Tr. 2:168.) Horn did recommend McCallum to Parlet. (Tr. 2:219, 246, 332.) The material point is that McCallum, a member of the Union (Tr. 2:167–168), was there, in part, to organize. (Tr. 2:246.)

states, in relevant part, "Start 1–2–96." In light of all the evidence, including Orby Renfroe's application, which I discuss next, I find that the reference means that Parlet hired Dearing and gave him a reporting date of January 2. Thereafter, because of time problems with either Dearing or the job, Parlet had to reschedule Dearing to start on January 17, 1996.

Orby C. "Sonny" Renfroe Jr. also applied on December 27. (R. Exh. 3f3.) Parlet, I find, made notations at the top of several of the application documents. Thus, "13," I find, means a hire-in rate of $13 per hour (Tr. 2:308, 311; R. Exh. 4i); the "Jackson lic." Refers to Renfroe's journeyman's license (R. Exh. 3f7) from the city of Jackson (Tr. 2:333; R. Exh. 3f3,7), and the "Start 1–2–96" means, I find, that Parlet hired Renfroe with a starting date of January 2, 1996. As the payroll records reflect, Renfroe's first workday was Tuesday, January 2, 1996. (R. Exh. 4i.)

David C. Gibson applied on January 16, 1996. (Tr. 2:352; R. Exh. 2e1.) Divine, in answer to a question containing Gibson's name with others (Tr. 1:39–41), testified that he told all of them to apply as covert salts, to conceal their union affiliation, not to show any (union) apprenticeship training, and not to list any union contractors. Gibson's application shows his "JATC apprenticeship school," and the contractors he lists are union contractors. (Tr. 2:354–355.) As Gibson recalls, he was not wearing any union insignia. (Tr. 2:353.) Although Gibson noted on his application (R. Exh. 2e1,4) that he possessed a master's license from the city of Jackson (Tr. 2:354), he was not hired even though he needed a job and would have taken one at LRE if offered (Tr. 2:373). When Divine and Yelverton dispatched Gibson, they gave him a tape recorder, with cassette, to carry with him to LRE. (Tr. 1:38–39; 2:355–357; 3:422; G.C. Exh. 6.) Gibson secretly recorded his interview by Foreman Parlet. (Tr. 2:358–364.) Overruling LRE's objection that the tape was secretly made in LRE's construction trailer without Foreman Parlet's knowledge or permission (Tr. 2:369, 372), I received (Tr. 3:438) the cassette tape (G.C. Exh. 6) in evidence. I also received (Tr. 2:370) in evidence a four-page transcript (G.C. Exh. 7) of the tape. (Because many of the statements on the transcript are no more than one line, with double spacing between the speakers, the amount of text is relatively small.) Turn now to the alleged acts of coercion.

C. Alleged Coercion

1. Introduction

As amended at trial (Tr. 1:7), complaint paragraph 7(a) alleges that "Superintendent" Art Parlet, on December 4, 5, and 8, coercively interrogated employees concerning their union membership. [I grant the General Counsel's motion (Br. at 3, fn. 5) to withdraw a fourth date of December 27.]

About December 4, complaint paragraph 7(b) alleges, Parlet "solicited an employee to act as an agent of Respondent and engage in surveillance of other employees in order to acquire knowledge of their Union activities and sympathies."

Complaint paragraph 7(c) alleges that, about December 7, Parlet "assaulted an employee because of his Union activities, membership and affiliation."

Finally, about January 11, 1996, complaint paragraph 7(d) alleges, Superintendent Parlet "insisted that employees remove their Union buttons."

The sole allegation pertaining to "Superintendent" Elton Smith is that, about December 8, Smith "insisted that an employee remove his Union button."

2. Foreman Art Parlet

a. Interrogation

(1) December 4 and 5, 1995

First, as LRE concedes (Tr. 2:366), Parlet admits (Tr. 2:319) that he asked all the job applicants whether they were union. As Parlet explains, he did so because LRE is "open shop." Expanding on this, Parlet asserts that LRE does not discriminate, but that if a person puts on his application that he has hobbies or belongs to organizations "it helps us, you know, to know who we're hiring and who we're not." Asked whether knowing the applicant is a union member helps LRE in that regard, Parlet responded that he has been "involved in the union" for many years, and his question is "not a discriminatory tactic." Parlet goes on to assert that he has cautioned several applicants, including Stephen Hilton, that they might have problems with the Union if they, unknown to the Union, worked at a nonunion shop. Moreover, Parlet asserts, he did hire Hilton and the others. (Tr. 2:319–320.)

On brief, LRE argues that such a single question, under the circumstances in each instance, was not coercive. (Br. at 19–21.) The General Counsel cites cases such as *Godsell Contracting,* 320 NLRB 871, 873 (1996), for the proposition that, as many Board cases hold, such a question in the context of a job interview is inherently coercive and therefore a violation of Section 8(a)(1) of the Act. Agreeing with the General Counsel, I find the violations, as alleged. Thus, when Parlet so interrogated apprentice Stephen Hilton on December 4, and compounded it the next morning, after Hilton had been hired, by asking him whether he was sent by the Union to salt the job, and receiving a "No" on both days (Tr. 2:392–393, 400–401, 404–405), LRE violated the Act.

(2) December 8, 1995

The violation on December 8 occurred shortly after the noon hour when Parlet asked Thomas "Sonny" McCallum, as the latter was completing his application, whether he was associated with the Union. McCallum said, "No." Later that afternoon Parlet hired McCallum and McCallum began work the following Monday. (Tr. 2:169–170.) McCallum, recall, was sent as a covert salt, and his application does not mention any union affiliation. Moreover, Parlet hired McCallum based largely on the recommendation of covert salt James Horn. (Tr. 2:332.) I find the violation, as alleged.

b. Solicitation of surveillance

Although Parlet hired apprentice Hilton, at a rate of $10 per hour (R. Exh. 4-1), Parlet was not sure he could trust him. Thus, the day after Hilton was hired, or about December 6, Parlet told James Horn that, while he did not think Hilton was a union organizer, he wanted Horn to "keep an eye on" Hilton and "see what he's up to." If Hilton is an organizer, Parlet said, he had lied, and Parlet expressed his dislike of persons who lie to him. Horn watched Hilton that day, observed that he worked, and reported that fact to Parlet. (Tr. 2:227–231, 253–254.) In his testimony, Parlet does not address this matter.

LRE does not brief the matter. Citing *McClain of Georgia*, 322 NLRB 367 (1996), the General Counsel argues that the alleged violation of Section 8(a)(1) is established. I agree.

c. Assaulted an employee

Although the allegation here names Parlet as the management person committing the violation, the evidence reflects that

Parlet was not the actor. Instead, it was Elton Smith, the alleged supervisor and agent. I address the procedural aspect of this is a moment.

As this allegation and complaint paragraph 8 (on December 8, Elton Smith insisted that an employee remove his union button) stem from the same incident, I treat them together.

On Thursday, December 7, Hilton reported to work openly wearing a T-shirt announcing that he was a union salt. On seeing the shirt, Parlet told Hilton, "People like you give me a complex." Hilton asked about what, but Parlet never answered. When Hilton entered the construction trailer for work the next morning, December 8, Parlet, Elton Smith, and James Horn were present. Hilton was openly wearing one of the big, 3-inch diameter, buttons (G.C. Exh. 3) bearing the IBEW and Local 480 names and declaring, "I'm A Union Organizer." Looking at the button, Smith told Hilton to take it off because Hilton worked for Little Rock Electrical, not the IBEW. Hilton replied that he was their official union organizer. As Hilton started toward the back of the trailer to get his hardhat and start for work, Smith reached over and knocked the organizer button off Hilton's shirt. Hilton picked up the button, put it back on, and went to work. (Tr. 2:235–237, Horn; 2:396–397, Hilton). LRE does not address the matter on brief.

Offered only to show unalleged animus, evidence presented by the Government establishes that on December 15 (a week after Hilton announced that he was a union salt and began wearing union insignia), and again on December 19, Parlet told McCallum to ride Hilton and force him to quit because Parlet could not fire him. (Tr. 2:173–177.) The implication, I find, in Parlet's instruction (which McCallum apparently did not follow) is that Parlet wanted this done because of Hilton's announcement that he was a union salt.

Recall from my earlier discussion, under the heading for Procedural Matters, that the General Counsel, at the end of the trial, had moved to conform the pleadings to match the evidence. The motion was for minor matters where the evidence, for example, supplied the correct date of the 9th for the 8th or a name where the pleadings had stated "last name unknown." (Tr. 3:446.) The motion was not to add any new allegations or to make any substantive corrections. LRE had objected when the General Counsel first announced the Government's motion to conform (Tr. 3:446), but had no objection (Tr. 3:447) when I summarized that the General Counsel's motion was "merely to correct variations in dates and names." I granted the motion "for those variations, not granted to any substantive correction or modification or addition to the complaint; not for substance, only for variations on dates and names, places." (Tr. 3:447.)

Now the General Counsel argues (Br. at 7, fn. 11), emphasis added:

> Counsel for the General Counsel moved to conform the pleadings with the evidence during the hearing and subsequently requested that Complaint paragraph 7(c) allegedly committed by Parlet be conformed with the *evidence that Smith committed t*he violations as set forth. (3:447, Jeannette) Smith did not testify at the hearing.

There was no express mention at transcript 3:447, or anywhere during the colloquy, that the motion was made, not to correct the spelling of a name, but to substitute the name of a different person from that of the name alleged. The latter is a substantive change which, even if somehow the words of the motion can be so construed, was definitely and specifically excluded by the basis of my ruling granting the motion—"not granted to any substantive correction or modification." (Tr. 3:447.) I reject the General Counsel's argument, and I am disappointed that the General Counsel would make the argument set forth in the Government's brief.

Prudence suggests that I address the potential argument, not made here by the Government, that the complaint was amended by implied consent, under FRCP 15(b), when LRE failed to object to the testimony describing Elton Smith's conduct in knocking Hilton's "I'm A Union Organizer" button off his jacket and to the floor. Certainly an argument could be made that LRE waived any objection to a variance between the pleading (assault by Parlet) and the evidence (assault by Smith) by not objecting when the description focused on the unalleged Smith. As stated earlier, however, LRE was representing itself (by its president, who is not a lawyer (Tr. 1:44), George E. Smith) as, in effect, a pro se. Some leeway must be accorded nonlawyers who represent themselves before Federal Agencies. It is not too burdensome on federal agencies to require that, if they wish to depart substantively from allegations, that they at least say so at the time so that the pro se not only is given express notice, but being so alerted, will have the opportunity to state any objection he may have. Fundamental fairness requires no less.

Because treating any waiver here as one of implied consent would deny fundamental fairness to a pro se, I therefore find that the matter was not tried by implied consent. There being no evidence supporting complaint paragraph 7(c), as alleged, I shall dismiss paragraph 7(c).[8]

Turn now to complaint paragraph 8 and Elton Smith's insistence that an employee (Hilton) remove his union button. The unrebutted evidence, described above, shows that this incident occurred as alleged. The General Counsel alleges and argues that Smith is a statutory supervisor and agent. Were I to reach the matter, I would find that the evidence fails to show any of the primary indicia of supervisory status as set forth in the statute. Thus, I would find no supervisory status as to Elton Smith, and would find that, particularly during 1995, he simply was an experienced and skilled craftsman who on occasion gave direction on proper methods to those of lesser skill and experience. Here, however, it is enough if Smith is shown to have been an agent under the statute. *Delta Mechanical,* 323 NLRB 76, 78 fn. 7 (1997).

I find that Elton Smith was, during the relevant time, LRE's agent within the meaning of 29 USC § 152(13). Under 29 USC § 152(2), LRE is responsible for any unfair labor practice committed by Smith as LRE's agent.

First, Smith is the master electrician in whose name the city of Jackson issued the permit for the electrical work. (Tr. 2:305–306, Parlet.) Second, Parlet told James Horn that Project Manager Willie Godwin had instructed him to work Elton Smith in a supervisory role. (Tr. 2:216.) Third, Horn observed that Smith at times would be in the construction trailer with Foreman Parlet working with the prints for the electrical work. (Tr. 2:218.) Fourth, in the presence of employee James Horn, Foreman Parlet had Smith review the applications of the eight (open salts) who applied the day before, November 27, to see whether he recognized any of the applicants. (Tr. 2:222–223.)

[8] The General Counsel does not argue that a violation is shown, as alleged, because, by failing to disavow Elton Smith's conduct, Foreman Parlet adopted it as has own.

Fifth, Smith was present on December 8 when Parlet interviewed, and unlawfully interrogated, job applicant Thomas G. "Sonny" McCallum. (Tr. 2:168–170.) Sixth, in keeping with his position as the master electrician for the job, Smith was paid $15 an hour—at least $2 per hour more than James Horn and any of the other journeymen were paid during December 1995. (R. Exh. 4a-1.) Finally, when Foreman Parlet did not disavow Smith's conduct on December 8 (accosting Hilton about his union button, telling him to take it off, and it off when Hilton declined to remove it), it demonstrated that LRE had placed Elton Smith in a position whereby employees reasonably would conclude that Smith was speaking and acting on behalf of LRE.

Finding agency status, I further find that LRE violated Section 8(a)(1) of the Act by insisting, through its agent Elton Smith on December 8, that apprentice Stephen Hilton remove his union button, as alleged by complaint paragraph 8.

d. Insisting that employees remove their union buttons

When James Horn walked into the construction trailer the morning of Thursday, January 11, 1996, he was wearing one or more union buttons, apparently the big, 3-inch diameter, IBEW "I'm A Union Organizer" buttons (G.C. Exh. 3). (Tr. 2:237–238.) Ralph Brown and Thomas "Sonny" McCallum came in behind Horn, and they, too, were wearing the IBEW organizer badges and IBEW stickers and T-shirts. (Tr. 1:220; 2:139, 239.) Parlet asked Horn if the buttons were real, and Horn said yes, that he was a union organizer and would organize before work, at break, lunch, and after work. Parlet asked him how long he had had the buttons. "For years," Horn answered, explaining that he had been a union member for 10 years. (Tr. 2:238, 251, Horn.)

At that point, in a repetition of his December 8 conduct, agent Elton Smith told Horn to take off the buttons. As he said this, Smith reached for the buttons and jostled them, knocking one to the floor. Horn picked it up, walked away, and, as it was not yet worktime, began soliciting some employees to take union cards. (Tr. 2:238–239.) When worktime began, Foreman Parlet told Horn that he would have to remove the union buttons because they were a "safety hazard." Horn said he disagreed that they were a safety hazard, but that he nevertheless would comply. Parlet asked Horn to tell Ralph Brown and "Sonny" McCallum to remove their union buttons. Horn went to Brown and McCallum and told them that Parlet had said the union buttons could not be worn on the job because they were safety hazards. When they disagreed the buttons were safety hazards, Horn told Brown, at least, to comply anyway. Horn removed his union button. (Tr. 1:111, Brown; 2:239, Horn.) McCallum apparently does not recall that Horn so told him (Tr. 1:178–179, 186), and removed his union button because Elton Smith said that the general contractor did not want them worn on the job. (Tr. 2:186–187, 191–192.)

LRE's written safety policy (R. Exh. 3a14), which each employee signs, contains as item 2 (emphasis added):

> Wear clothing suited for the job—no dangling or loose clothing or jewelry *around moving machinery*. Do not wear soft soled shoes, shirts must be worn, boots, gloves, etc., must be worn when working in concrete.

By questions during crossexamination of some witnesses (Tr. 1:121, Brown; 2:185, McCallum), and by the representation of LRE's representative at trial (Tr. 2:190), LRE implies that it relied on item 2 as a valid basis for instructing the employees to remove the large union organizer buttons. However, although I cautioned Representative George E. Smith Jr. that such would require testimony (Tr. 2:190), no such testimony was adduced. Moreover, there is no evidence that the electricians here worked around "moving machinery." Regardless of LRE's implied argument at trial, and on brief (at 17), the credited evidence shows that LRE's employees, as standard practice, wore loose clothing, dangling gold necklaces, and a variety of tools hanging from a belt. (Tr. 2:185–186, 188–189.) Indeed, there is no evidence that LRE has ever interpreted safety rule 2 so as to tell employees that they could not leave their shirt tails out (as some do), or wear gold chains around their necks (as at least McCallum does). Finally, there is no evidence as to what the term "moving machinery" includes or whether there was any such on the job.

It is the employer's burden to show that "special circumstances" exist which justify instructions for employees to remove union buttons. *Raley's,* 311 NLRB 1244, 1244 fn. 2, 1246 (1993). Neither hearsay references by Elton Smith to some unsupported directive by the general contractor, nor the facially inapplicable safety rule 2, constitute any evidence of the "special circumstances" necessary to justify LRE's January 11, 1996 directive that employees must remove their union organizer buttons. LRE, in an apparent effort to bolster its position that the badges were prohibited because they were a safety hazard (with no description of why the badges were a safety hazard), also observes that there is no evidence that LRE ordered employees not to wear union stickers or T-shirts. That distinction possibly would have been a factor for consideration had there been evidence as to why the badges would constitute a safety hazard while dangling tools and gold chains would not. Under the circumstances, including Parlet's acquiescence in the December 8 and January 11 assaults by agent Elton Smith, I find that what infuriated LRE about the buttons, as distinguished from the other items, is that they were big, 3-inch diameter badges, with an in-your-face announcement that "I'm A Union Organizer." That fact incensed LRE, and LRE then seized on an unsupported pretext that the buttons somehow constituted a safety hazard even when dangling items like jewelry, shirt tails, and tools do not. Accordingly, I find that, as alleged, LRE violated Section 8(a)(1) of the Act when, on January 11, 1996, it insisted that employees remove their union buttons.

D. Alleged Discrimination

1. Introduction

Complaint part 9 (in conjunction with par. 10 and 12) alleges that LRE violated Section 8(a)(3) of the Act by refusing to hire the eight individuals who applied on November 27, 1995, and David Gibson, who applied January 16, 1996. LRE denies.

Respecting failure-to-hire cases, the elements of a prima facie case (which the Government must establish) are:

> 1. Applications by qualified applicants were filed while the respondent employer was hiring.
>
> 2. The respondent employer knew the job applicants were affiliated with a union.
>
> 3. The respondent employer harbored union animus.
>
> 4. Acting on its animus, the respondent failed to hire any of the applicants.

WestPac Electric, 321 NLRB 1322, 1346 (1996); *Bay Control Services,* 315 NLRB 30 fn. 2 (1994); *J. E. Merit Constructors,* 302 NLRB 301, 303–304 (1991).

Once the General Counsel has established a prima facie case of a violation, the respondent employer must go forward and demonstrate, as an affirmative defense, that it would not have hired the applicants even absent their known or suspected union status. *WestPac Electric,* supra, 321 NLRB at 1345–1346.

2. Facts

There is no dispute that the eight applied on November 27, and that they openly were wearing union insignia. LRE's hiring policy (R. Exh. 6), quoted earlier, provides that job applications remain active for 15 days. The General Counsel relies, in part, on the pay time records which show that, with those 15 days (counting November 28 as the first day), LRE hired four electricians: Ralph Brown, Thomas G. McCallum, Don Talley, and Larry Alting. As I described earlier, we know that, during the 15-day time frame, Brown and McCallum were interviewed, hired, and put to work. Also, Alting applied on December 12, was interviewed and hired that same day (Tr. 2:315, Parlet), and started work the next day (R. Exh. 4e). Don Talley first shows on the payroll on Tuesday, December 12. (R. Exh. 4c.) His application (R. Exh. f3,5,8) is dated December 8. Thus, he, too, was hired within the 15 days.

Although Brown was licensed by the City of Jackson (R. Exh. 3a7,8), McCallum, as I noted earlier, was not. Moreover, McCallum, referred by covert salt James Horn, listed no union contractors on his application. (Tr. 2:171.) Indeed, for the 16 years' experience he stated on page 1 of his application (R. Exh. 3e3), McCallum shows only one employer, and that for the period of May 1992 to October 1995. (R. Exh. 3e4.) Foreman Parlet asserts (Tr. 2:317) that he told Union Representative Divine on November 27 that he suspects there is a problem when an electrician has been in the trade for 10 years or so and has no license from some city or State. Nevertheless, Parlet hired McCallum even though McCallum specifically marked on his application that he had no license. (R. Exh. 3e7.) According to Parlet, he gave heavy weight to Horn's recommending McCallum. (Tr. 2:332.) No doubt Horn's recommendation made the decision easier for Parlet, but the real motivation, I find, was that everything about McCallum appeared nonunion to Parlet. And recommendation or not for McCallum, Parlet had just told Divine, on November 27, that he would hire only those licensed by the city of Jackson. (Tr. 2:317, 345, Parlet.) As Parlet explains, although only one working is all that the city required (Tr. 2:304–305), he (supposedly) wanted as many as he could hire so that if one (or more) was off work because of illness [or, presumably, for any other reason], the city inspector would not shut down the electrical work on the job. (Tr. 2:331.) Nevertheless, although Larry Alting and Don Talley listed licenses from, respectively, Miami, Florida (R. Exh. 5a3), and Tennessee (R. Exh. 5f5), neither showed on his application that he possessed a Jackson city license.

Parlet's testimony rings hollow, and I do not believe him. Aside from his poor demeanor, and hollow-sounding testimony, his hiring record belies his asserted prescription for hiring. As already noted, Horn had a city license (G.C. Exh. 2), and on November 27 Parlet told Divine that he, Parlet, already had three licensed electricians on the job. (Tr. 1:49, Divine.) It is unclear whether the three included Elton Smith, who held a Jackson city master's license. This is not to say that Parlet did not want Jackson city card holders. No doubt he wanted more. But the point is that such a qualification was not the condition of employment which Parlet described at trail as expressing to Divine on November 27. Thus, that asserted condition was false, and, I find, nothing but a pretext to avoid hiring any of the seven (Pickett had a Jackson city card) open salts of November 27 whose applications showed, on average, that they had 18 years' experience as electricians at the journeyman level. Moreover, as Parlet disregarded his asserted hiring condition of a Jackson city card, I attach no significance to the fact that (covert salt) Orby C. "Sonny" Renfroe Jr. (applied and was hired on December 27 and started work on January 2) possessed a Jackson city card. That is, I count the vacancy which Renfroe filled as a vacancy which could have been filed by one of the open salts.

David Gibson, the other alleged discriminatee, applied on January 16, 1996. As already noted, Gibson held a Jackson city master's license and so marked his application. With 30 years' experience shown on his application, Gibson was not hired even though, as the General Counsel observes on brief, other began working thereafter. As the transcript (G.C. Exh. 7) reflects concerning Gibson's interview with Parlet, Parlet asserted that he recently had hired some employees who were scheduled to report later. One of those could have been William B. Darling, whose application is dated January 15. (R. Exh. 5d1.)

Similarly, Carl R. England, whose application (showing a license from Pascagoula, Mississippi) is dated November 6 (R. Exh. 5e1), began working on January 17. (R. Exh. 4-o.) LRE's hiring of England (whose application reports only 5 years' experience as a journeyman) shows two additional things. First, it shows that LRE's hiring rule about applications being active for only 15 days is largely a device to screen out unwelcome applicants, and is disregarded by LRE at will. In England's case, not only does his application show, for work experience, that he has been "Self Employed" for his 5 years' experience as an electrician, but his application also shows (R. Exh. 5e1) that he had once been convicted of "carrying a concealed weapon." Thus, rather than hire any of the experienced eight from November 27, or David Gibson from January 16, Parlet reached back to England's November 6 application and brought to the job a man with only 5 years' experience (and no Jackson city license) who had a conviction for the criminal offense (presumably a felony) of carrying a concealed weapon.

LRE suggested at trial that Gibson, with his master's license, was not needed, since it is undisputed that only one master's license per job is necessary, and also, by virtue of the master's license, that Gibson was "overqualified" for any work as (presumably) a journeyman. (Tr. 2:367.) Several times I told LRE's trial representative not to make statements of asserted facts (Tr. 1:67; 2:255, for example), that his representations were not evidence, and that it would require testimony to prove the content of his representations (Tr. 2:190, 368, for example). I therefore construe the remarks of LRE's representative (its president, George E. Smith) as an extension of LRE's argument on the issues. Argument, however, must be based on the record.

And that leads to the second point—there is no evidence that Parlet, or any LRE official, rejected Gibson's application for any reason, and certainly not for being overqualified. Third, Gibson's application reflects that his experience was as a journeyman. (R. Exh. 2e1,2.) Indeed, Gibson testified that he has never, in the 20 years that he has held a master's license, used that license to "permit" a job. (Tr. 2:350–351.) There is no doubt that Gibson was applying for work as a journeyman, and

his interview with Parlet implies as much even though he mentions that he has a master's license. As Parlet concedes, a master's license (aside from the qualification of being able to permit a job) means that the holder has more talent and experience. (Tr. 2:318.) Although at one point in the taped interview Parlet refers to Gibson's qualifications, in a manner simply of acknowledging them, it is clear that the concerns which Parlet was expressing were whether the people he had hired would show up and whether he would have enough helpers for his journeymen. (G.C. Exh. 7 at 3–4.)

LRE hired others in January. James A. Conley applied on January 9, 1996, with the experience of a 5-year apprentice. (R. Exh. 5c1.) He started work the very next day at the journeyman's rate of $13 per hour. (R. Exh. 4m.) According to Parlet, Project Manager Godwin, as Parlet was preparing to leave for the Jackson job, had prearranged that Conley would be hired on the job as a journeyman. (Tr. 2:318.) Even assuming that is so, I find that to be true only in the sense that there would have been an opening available. Had the November 27 eight been hired, there may not have been an opening. So far as the record shows, the opening Conley filled would have been filled by one of the eight from November 27.

Parlet also hired (covert salt) Tommy Dearing in, as I have found, late December, although his first day was delayed until January 17. After the Union salts began striking in January to protest asserted unfair labor practices, LRE, still not calling any of the eight, or David Gibson, hired additional employees. This included Billy V. Burk (who applied on January 31) as an employee "loaned" from Lynn Rogers Construction from February 1 to 18 as a favor to the loaning company so that Burk would have work as the other company ended one job and started another. (Tr. 2:323, 337–338; R. Exh. 4r,v.) That may well be true, but LRE could not, as it did, bypass the eight, plus Gibson, for discriminatory reasons.

LRE also hired Roy Stephenson (who had worked on other jobs for LRE) on January 29, but he only worked 2 days and then never reported back for work and was terminated. (Tr. 1:16–18; R. Exh. 4q.) Similarly, a journeyman who had worked on other jobs for LRE also was employed by LRE at the Jackson jobsite beginning January 23 until about February 13, 1996, at which time he left for an LRE job in Georgia. (Tr. 1:18–19; R. Exh. 4n-t.)

3. Discussion

Taking, in turn, the elements of the Government's prima facie case, it appears undisputed that the alleged discriminatees applied during a time frame when LRE was hiring journeymen electricians. Respecting LRE's 15-day policy (for applications to remain active), I have found that LRE observes and disregards that policy as it suits LRE's desires to remain nonunion. As a consequence of that disparity in enforcement, I find that the 15-day policy does not apply to the applications of the nine alleged discriminatees.

Knowledge of prounion status, the second factor, is undisputed as to all nine. The eight who applied on November 27 came as open salts, and David Gibson, who applied on January 16, 1996, in addition to listing union contractors on his application, was asked by Parlet, in the taped interview, whether he was a member of the "IBEW," to which Gibson answered yes. (G.C. Exh. 7 at 3.) Moreover, Parlet admits to a practice of asking all applicants (other than the open salts) whether they are IBEW members. (Tr. 2:319, 366.)

Animus, the third factor, is well established and generally uncontested. Parlet's admitted interrogation of all applicants (other than open salts) as to their union membership was done, I find, as a blatant effort to screen out union members, especially those who might be union activists such as union salts. Parlet may very well have hired some union members on other jobs (as with Stephen Hilton here) when he thought the person was working nonunion and without his union's knowledge. But that hiring, I find, was on the perception that such employees were, in effect, hiding from their local union and therefore would not try to organize the job. As the credited evidence demonstrates, Parlet has a very different attitude when it appears that an employee is a union salt.

As we have seen, when Elton Smith assaulted apprentice Hilton on December 8, and James Horn on January 11, and knocked their union badges to the floor, Foreman Parlet, who was present, neither cautioned Smith nor said one word of disavowal of Smith's misconduct. By such acquiescence, Parlet, and LRE, adopted the assaults. Note also that Parlet wanted McCallum to "ride" Hilton until he quit—a request, I have found, motivated by Parlet's antiunion animus. Finally, relying on a pretext that the union buttons of the union salts were a safety hazard, LRE ordered them removed. All in all, the evidence establishes that LRE harbors a virulent antiunion animus.

Action is the fourth category. Did LRE act on its animus (that is, was the animus a motivating factor) so as to deny jobs to the alleged discriminatees? The answer, I find, is yes—at least as to six of the nine. The answer is no as to Assistant Business Managers' Divine and Yelverton and to applicant Michael V. Pickett. As I have found, Parlet, on checking one of Pickett's former employer's, received an unfavorable report. As Parlet rejected Pickett on that uncontradicted basis, I shall dismiss complaint paragraph 9 as to Michael V. Pickett.

I likewise shall dismiss as to Divine and Yelverton because of LRE's hiring rule that no applicant will be hired who simultaneously works for another employer. Such a rule is valid. See *Architectural Glass & Metal Co. v. NLRB,* 107 F.3d 426, 432–433 (6th Cir. 1997); *Willmar Electric Service,* 303 NLRB 245, 246 fn. 2 (1991), enfd. 968 F.2d 1327 (D.C. Cir. 1992). The situation of "loaned" employee Billy V. Burk does not show disparity of enforcement because there is no evidence that Burk remained on the payroll (even in name, much less in money) of the loaning company, Lynn Rogers Construction, during the 2 weeks or so that he worked temporarily for LRE.

As to the other six (the three Bartons, Marby R. Penton Jr., Johnnie H. Smith Jr., and David Gibson), the evidence shows that each was denied employment even though another person was hired. The others hired include covert salts Ralph Brown, Thomas McCallum, Larry Joe Alting, Tommy Dearing, and Orby C. "Sonny" Renfroe Jr. plus William B. Darling, Carl R. England, and Don Talley. Of those eight only Brown and Renfroe possessed Jackson city cards (a factor which, I have found, Parlet did not follow in any event). Some of the eight (in addition to union salts Brown, McCallum, Alting, Dearing, and Renfroe), such as Don Talley with 24 years' experience, and William B. Darling with apparently some 15 years' experience (since June 1980; R. Exh. 5d2), quite possibly were very qualified electricians. But the six had applied first and, I find, passed over because of their status as union salts.

Carl England (with only 5 years' experience and a felony conviction for carrying a concealed weapon) began work on January 17—1 day after David Gibson, with 30 years' experi-

ence, a master's license, and a clean record, applied. England possibly was hired before Gibson applied. But England should not have been hired because his application, dated November 6, was stale under LRE's rules. Moreover, LRE never called Gibson later in January when it hired still others. Even when the strike exhausted LRE's ranks of Jackson city journeyman card holders (Tr. 2:333, Parlet), LRE stubbornly refused to call David Gibson when Gibson possessed a Jackson city master's license. It so refused, I find, because it knew that Gibson was a union member.

In light of the foregoing, I find that LRE violated Section 8(a)(3) and (1) of the Act when, on November 27, 1995, it refused to hire Hewitt P. Barton Sr., Hewitt P. Barton Jr., William P. Barton, Marby R. Penton Jr., and Johnnie H. Smith Jr., and on January 16, 1996, when it refused to hire David Gibson. The determination of backpay, reinstatement to other jobs, and other benefits, shall be determined at the compliance stage.

CONCLUSIONS OF LAW

Respondent Little Rock Electrical Contractors is shown to have violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above, and its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act. In certain particulars discussed, LRE did not violate Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The remedial formula is set forth in *WestPac Electric,* 321 NLRB 1322, 1322–1323 (1996). Because Respondent LRE discriminatorily failed and refused to hire six named job applicants, I shall order it to offer them employment to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of the Respondent's hiring discrimination. Additionally, I shall order the Respondent to make the six whole for any loss of earnings or other benefits which they may have suffered as a result of the discrimination practiced against them, from the date they applied for employment to the date that the Respondent makes them a valid offer of employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

This Order is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors,* 285 NLRB 573 (1987). See *Casey Electric,* 313 NLRB 774 (1994). Although there is evidence here that Respondent transfers employees to other jobs, the matter was not fully litigated. Accordingly, consistent with *Dean General Contractors,* supra, Respondent LRE will have the opportunity in compliance to show that, under its customary procedures, the six job applicants' positions would not have been transferred to another jobsite after the Jackson, Mississippi project (The Junction shopping center) on which the discrimination occurred was completed, and that therefore no backpay and reinstatement obligation exists beyond the time when LRE finished The Junction project at Jackson, Mississippi. And, presumably, that job is completed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Little Rock Electrical Contractors, Inc., Little Rock, Arkansas, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a) Coercively interrogating employees or job applicants about their union membership or union activities.

(b) Soliciting employees to surveil other employees in order to acquire knowledge of their union activities.

(c) Insisting that employees remove their union buttons while working, unless special circumstances justify ordering such removal.

(d) Discriminating against job applicants, such as by refusing to hire them, because of their membership in or support of a union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to the employees named below employment in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

(b) Make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

Hewitt P. Barton Sr.	Hewitt P. Barton Jr.
William P. Barton	Marby R. Penton Jr.
Johnnie H. Smith Jr.	David Gibson

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire any of the six applicants named above, and within 3 days thereafter notify the employees in writing that this has been done and that the discrimination will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Little Rock, Arkansas facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 17, 1996, the date the charge herein was filed and served.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found, including complaint paragraphs 7(b), 7(c), and 9 as to alleged discriminatees Wayne A. Divine, Sammy Yelverton, and Michael V. Pickett.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights, and more specifically:

WE WILL NOT discriminate against you or job applicants because of your (or their) membership in a local of the International Brotherhood of Electrical Workers, or because of your (or their) activities on behalf of the IBEW or one of its locals.

WE WILL NOT coercively interrogate you or job applicants about union membership, support, or activities.

WE WILL NOT solicit you to surveil other employees in order to acquire knowledge of their union activities.

WE WILL NOT insist that you remove your union buttons while working unless there are special circumstances justifying our instructing you to do so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to the employees named below employment in jobs for which they applied or, if such jobs not longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired.

WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest.

Hewitt P. Barton Sr.	Hewitt P. Barton Jr.
William P. Barton	Marby R. Penton Jr.
Johnnie H. Smith Jr.	David Gibson

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our refusal to hire any of the six job applicants named above, and WE WILL within 3 days thereafter notify each of them in writing that this has been done and that the discrimination will not be used against them in any way.

LITTLE ROCK ELECTRICAL CONTRACTORS, INC.

---

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."